Rakyat Merchant Bankers Bhd v Abdul Rahim Aki & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-370-1995
STEVE SHIM J
30 APRIL 1998

Civil Procedure *— Affidavits — Affidavit in reply — Filing and service of — Whether the 14-day period within which an affidavit in reply must be filed and served on the other party should be computed from the date on which the affidavit intended to be replied to was served or 14 days from the date of the service of the sealed copy of the summons in chambers — Rules of the High Court 1980 O 32 r 13(2)*

The defendant filed and served the unsealed copy of the summons in chambers together with the supporting affidavit on the plaintiff on 23 March 1998. The plaintiff filed and served its affidavit in reply on 10 April 1998. The defendant raised a preliminary objection that the affidavit in reply filed by the plaintiff should be rejected as it contravened O 32 r 13(2) of the Rules of the High Court 1980 which requires a party to file and serve an affidavit in reply within 14 days from the date on which the affidavit he intends to reply was served on him. The plaintiff submitted that the 14-day period should run from the date of the service of the sealed copy of the summons in chambers, ie on 6 April 1998.

Held, allowing the preliminary objection:

It is clear that under r 13(2)(a), any supporting affidavit to an application has first to be filed with the court registry within 14 days from the date of the filing of the application. Similarly, it must be served on the other party within 14 days from the date of the filing of the said application. There is no mention that it should be filed and served within 14 days from the date of sealing of the application. Based on authority, time must run from 23 March 1998, which was the date on which the summons in chambers was filed with the court registry. In the circumstances, by filing his affidavit in reply and serving it on the defendant on 10 April 1998, the plaintiff had gone beyond the 14-day period by at least two clear days after being served with the supporting affidavit on 23 March 1998 and had contravened O 32 r 13(2)(b) (see pp 301H–I and 302I); *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 followed.

[Bahasa Malaysia summary

Defendan memfail dan menyampaikan salinan saman dalam kamar yang tidak dimeterai bersama dengan afidavit sokongan ke atas plaintif pada 23 Mac 1998. Plaintif memfail dan menyampaikan afidavit jawapan pada 10 April 1998. Defendan menimbulkan bantahan permulaan bahawa afidavit jawapan yang difailkan oleh plaintif patut ditolak kerana ia melanggar A 32 k 13(2) Kaedah-Kaedah Mahkamah

Tinggi 1980 yang menghendaki sesuatu pihak untuk memfail dan menyampaikan afidavit jawapan dalam masa 14 hari daripada tarikh afidavit yang pihak itu berhasrat untuk menjawab disampaikan ke atasnya. Plaintif berhujah bahawa tempoh masa 14 hari patut bermula daripada tarikh penyampaian saman dalam kamar yang dimeterai, iaitu pada 6 April 1998.

Diputuskan, membenarkan bantahan permulaan:

Adalah jelas bahawa di bawah k 13(2)(a), apa-apa afidavit sokongan kepada permohonan mestilah terlebih dahulu difailkan di pejabat pendaftaran mahkamah dalam masa 14 hari daripada tarikh pemfailan permohonan. Begitu juga, ia mesti disampaikan ke atas pihak yang satu lagi dalam masa 14 hari daripada tarikh pemfailan permohonan tersebut. Tidak ada disebut bahawa ia perlu difailkan dan disampaikan dalam masa 14 hari daripada tarikh permohonan itu dimeterai. Berdasarkan autoriti, masa mesti bermula daripada 23 Mac 1998, iaitu tarikh di mana saman dalam kamar difailkan di pejabat pendaftaran mahkamah. Dalam keadaan itu, dengan memfailkan afidavit jawapannya dan menyampaikannya ke atas defendan pada 10 April 1998, plaintif telah melampaui tempoh masa 14 hari iaitu selama dua hari genap selepas disampaikan dengan afidavit sokongan pada 23 Mac 1998 dan telah melanggar A 32 k 13(2)(b) (lihat ms 301H–I dan 302I); *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 diikut.]

Notes

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

Cases referred to

Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (flld)

PB Securities Sdn Bhd v Abdul Rashid bin Mohd [1994] 3 MLJ 168 (refd)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)

Legislation referred to

Rules of the High Court 1980 O 2, O 32 r 13(2)

Michael Tan (*Tan Lip Yip & Co*) for the applicant/third defendant.
KA Gan (*Lee Hishamuddin*) for the respondent.

Steve LK Shim J: By a summons in chambers, the third defendant has applied for stay of proceedings pending appeal against the decision of the

learned senior assistant registrar. It is supported by the affidavit of the third defendant. The application is resisted by the plaintiff who has filed the affidavit in reply affirmed by Thangamany a/p Siniah, the assistant manager of the credit control department of the plaintiff.

Before dealing with the merits of the application, Mr Michael Tan for the third defendant has raised a preliminary objection. He contends that the affidavit in reply filed by the plaintiff should be rejected as it contravenes O 32 r 13(2) of the Rules of the High Court 1980 which requires a party to file and serve an affidavit in reply within 14 days from the date on which the affidavit he intends to reply was served on him. He says that in this case the unsealed copy of the summons in chambers together with the supporting affidavit was served on the plaintiff on 23 March 1998 and therefore the 14-day period should run as from that date and that the plaintiff, by filing and serving its affidavit in reply on 10 April 1998, had quite obviously gone outside the time limit by at least two clears days. He cites in support the Court of Appeal case of *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581.

In response, Mr Gan for the plaintiff has submitted that the 14-day period should run from the date of the service of the sealed copy of the summons in chambers. According to him, the sealed copy of the summons in chambers together with the supporting affidavit was served on the plaintiff's solicitors on 6 April 1998 and as the affidavit in reply of the plaintiff was filed and served on the third defendant's solicitors on 10 April 1998, it was therefore done well within the time limit provided under the Rules. Here, he cites in support *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85, also a Court of Appeal case which seems to hold that an affidavit in support of a summons in chambers application can have no legal effect until and unless the said summons in chambers has been effectively sealed by the court.

At the outset, it is obviously necessary to take a closer look at the wordings of O 32 r 13(2)(a) and (b) which stipulates:

> (2) Save as otherwise provided in these rules —
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
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> (b) a party wishing to reply an affidavit serve on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It is crystal clear, I think, that under r 13(2)(a) above, any supporting affidavit to an application has first to be filed with the court registry within 14 days from the date of the filing of the application. Similarly, it must be served on the other party within 14 days from the date of the filing of the said application.

There is no mention that it should be filed and served within 14 days from the date of sealing of the application. This important element or distinction is clearly emphasized in the judgment of Mahadev Shankar

JCA in *Structural Concrete* in particular that part of which states (at p 586): A

> However, we would like to add that the critical words in O 32 r 13(2) — for the purposes of computation of time — are 'within 14 days from the date of the *filing* of the application'... .
>
> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. .... The object of the exercise there is to give the adverse party notice as soon as possible without reference to the eventual date when the application would be sealed in the registry. By the time that event took place, it was envisaged that the affidavit in support of the application would already be in place and the registry would therefore be in a better position to allot the return date on which the application should be heard. (Emphasis added.)

B C

In this instant case, the following facts appear undisputed, namely: (1) that on 23 March 1998, the unsealed copy of the summons in chambers together with the supporting affidavit was filed by the third defendant with the court registry. It is to be noted of course that a summons in chambers application has to be filed with the court registry in order that it may be sealed. So it is obvious that sealing must follow upon the filing of the said application; (2) that this sealed copy of the summons in chambers together with the supporting affidavit was served on the plaintiff's solicitors also on the same date, ie 23 March 1998; (3) that the said summons in chambers was subsequently sealed. From the records, it is not entirely clear when exactly it was sealed but, in any event, according to Mr Gan, the sealed copy of the summons in chambers was served on them on 6 April 1998. It is his contention therefore, applying the construction adopted in *Perbadanan Nasional Insurans* that since they had filed and served their affidavit in reply on the third defendant's solicitors on 10 April 1998, they were well within the 14-day period under the Rules.

D E F

Let me say that I think the case of *Structural Concrete* is more directly relevant to the present case. There the Court of Appeal, in considering O 32 r 13(2), has obviously placed great emphasis on the words 'within 14 days from the date of the filing of the application' and on that basis, have held that time is to run not from the date on which the application is sealed but the date on which the application is filed. No doubt there is a clear distinction between sealing a document and filing it. Here, as I have said, there is no dispute that the summons in chambers, though unsealed, was filed with the court registry on 23 March 1998 together with the supporting affidavit. It is also not disputed that the said summons in chambers together with the supporting affidavit was served on the plaintiff's solicitors on the same date, ie 23 March 1998. In the light of clear provisions under O 32 r 13(2) as construed by the Court of Appeal in *Structural Concrete*, I am of the view that time must run from 23 March 1998, which is the date on which the summons in chambers was filed with the court registry. In the circumstances, by filing his affidavit in reply and serving it on the third defendant's solicitors on 10 April 1998, the plaintiff has, in my view, gone beyond the 14-day period by at least two clear days after being served with the supporting affidavit on 23 March 1998. He has quite obviously contravened O 32 r 13(2)(b). In the premises, I will sustain the preliminary objection raised by counsel for the third defendant.

G H I

A As there is no application for abridgement of time to file in the relevant affidavit in reply by the plaintiff nor is there any alternative proposition that notwithstanding the contravention, it is one curable under O 2 of the Rules, I must, having sustained the preliminary objection, therefore disallow the use of the affidavit in reply of Thangamany a/p Siniah affirmed on 10 April 1998. In so doing, let me harken to those salutary words of B Richard Tallala J in *PB Securities Sdn Bhd v Abdul Rashid bin Mohd* [1994] 3 MLJ 168 as regards the object of O 32 r 13(2) which seem so appropriate in circumstances such as the present. He said this (at p 174):

> As I understand it r 13 originally stood as it now does in sub-r 1 thereof. Rule 13(2) which was introduced by amendment which came into effect on C 1 August 1993 was effected to bring order to disorder created in the hearing of applications in chambers by parties filing affidavits at the eleventh hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in question having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rules Committee in introducing r 13(2) D intended that its provisions should apply to the well-entrenched and I would say more stringent procedure applicable to O 14.

Taking the cue from the Court of Appeal in *Structural Concrete*, I too would respectfully adopt those observations and apply them in the instant case.

E *Preliminary objection allowed.*

Reported by Jafisah Jaafar

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